Fatwa and the Making and Renewal of Islamic Law

From the Classical Period to the Present

OMER AWASS
American Islamic College

CAMBRIDGE
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In this book, Omer Awass examines the formation, history, and transformation of the Islamic legal discourse and institutions through the lens of a particular legal practice: the issuance of fatwas (legal opinions). Tracing the growth of Islamic law over a vast geographical expanse – from Andalusia to India – and a long temporal span – from the seventh to the twenty-first century, he conceptualizes fatwas as the "atomic units" of Islamic law. Awass argues that they have been a crucial element in the establishment of an Islamic legal tradition. He also provides numerous case studies that touch on environmental, economic, social, political, and religious topics. Written in an accessible style, this volume is the first to offer a comprehensive investigation of fatwas within such a broad spatio-temporal scope. It demonstrates how instrumental fatwas have been to the formation of Islamic legal traditions and institutions, as well as their unique forms of reasoning.

Omer Awass is Associate Professor of Arabic and Islamic Studies at American Islamic College.

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I dedicate this work to my father, Ahmed Awass, and my mother, Amina Alnini. Neither of whom were learned people, but had a tremendous respect for knowledge. Thus, they always encouraged me to pursue education.

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Introduction

The aim of this book is to examine the formation and transformation of Islamic legal discourse and the impact of that discourse on Muslim society by analyzing fatwas (religious legal opinions) over the course of Islamic history. Historically speaking, substantive aspects of Islamic law developed out of the material of these fatwas. In the very early stages of Islamic history, there were no formal laws to instruct people in their religious and social concerns, but the manner in which Muslims received guidance with regard to their religious practice was by posting their concerns to early proto-jurists in the form of religio-legal questions, whose responses became known as fatwas. Out of the critical mass of these fatwas, an Islamic legal doctrine took shape and a definitive corpus of Islamic law came into being.

Essentially, my investigation looks at the development and maturation of Islamic law[1] through the lens of a legal practice: the issuance of fatwas. By examining fatwas in different periods of Islamic history from

[1] Lena Salaymeh (2016, 22) eschews a developmental approach to Islamic law that she calls an "origins" approach because she claims that it essentializes Islamic law in that it implies that there is an essentialized subject that is undergoing a linear progression that passes from an earlier stage to a more developed later stage. Moreover, she claims this linear progression is essentializing because it neglects Islamic law's embeddedness in a distinct context (Salaymeh, 23). Her argument is not at all clear to me that taking a developmental approach to Islamic law necessitates essentializing it because one can certainly contextualize that development by showing how the context induced transformations in a certain direction. Nor is it certain that by asserting historical development one is assuming that there is an essentialized subject that is undergoing a linear progression as such a progression need not be conceptualized as an inherent course of history but rather a process that is subject to various historical contingencies.

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the beginning until today, I chart the establishment of an Islamic legal tradition and its transformations. More particularly, my analysis draws attention to the way in which fatwas contributed to the formation of Islamic legal reasoning and institutions. Moreover, by analyzing fatwas issued by Muslim jurists from various regions and periods, I identify how fatwas were essential catalysts for historical change, which gives us a better appreciation of the interrelationship between law and society.

Yet even though Islamic legal doctrines and institutions like *madhhab*s (legal schools) partially arose from the discourses and activities associated with the fatwas of early jurists, fatwas in the post-classical period were structured in accordance with the formal rules that governed those discourses and institutions. Hence, there was a reflexive relationship between fatwas and these legal principles, practices, and institutions: Fatwas helped give shape to legal doctrines and legal schools and in turn were later regulated by the constraints of the Islamic legal tradition that they helped construct. This work tries to show how this historical dynamic emerged and what that meant for the transformation of Islamic law in the post-classical period.

This historical foundation provides a basis for a diachronic assessment of the transformations that have taken place in the Islamic legal tradition as a result of the encounter with colonialism. In the latter part of my investigation, I examine how the practice and rationalization of *iftāʾ*, the practice of issuing a fatwa, have changed due to the impact of colonialism on the Muslim world. In this era, the established practices and doctrines of Islamic law were critiqued through the lens of modern Western ideas as well as historical Muslim ideas that were seen to be congruent with "modern" ways of thinking. This spawned colonial-era Muslim movements that sought to reform Islamic law and redefine its relationship with the state and society.

After historically establishing the ideas advocated by reformers, I assess whether those calls for reform have actually affected the practice of Islamic law at the substantive and procedural levels. I do this by subjecting fatwas issued in the colonial and post-colonial period to critical analysis to determine whether the procedures or rationale of fatwas has changed in a fundamental way. The larger themes that I address in my latter analysis are whether the modern trend among some Muslim thinkers and jurists toward contextually oriented legal concepts represents a lasting shift away from the traditional textually oriented legal methodology to produce a new type of discourse that is revolutionizing Islamic

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law or whether is it a passing phenomenon that will not make a lasting impact on how Islamic law is derived in the future.

Fatwas are the key starting points in addressing these questions because they represent the most elemental dimensions of Islamic law and the new legal developments within it. Thus, they offer vistas on how Muslim religious and legal practice may undergo a change in the future.

In charting the historical development and continuing evolution of Islamic law through the medium of fatwas, I am asserting that fatwas are the atomic components of Islamic legal discourse and practice and, as such, that they tell us a lot about Islamic legal formation. Looking at the development of Islamic legal tradition through the lens of fatwas gives us a sense of how the internal dynamics of the religion of Islam led to this legal formation. In this way, we can chart the origins of the law and the legal tradition from the discursive and social roots of the religion itself.

This investigation seeks not only to map the transformations that have occurred in Islamic legal discourse and tradition through the examination of its elemental components of fatwas but also to allude to the historical impact that this discursive legal practice has had on the history of Islamic civilization. There is a reciprocal relationship between fatwas and social change in Muslim society because fatwas have their origin in the social and religious issues that have arisen in Muslim society since they are legal responses to those issues. Thus, they play the role of indicators of social change as they are a legal representation of that change. On the other hand, since they are legal responses to social changes, they either facilitate those changes by legitimating them or hinder the establishment of those changes by branding them illegitimate.

In addition, fatwas have their origin in civil society because of their dialogical character. This is because they are social exchanges between the public and the *muftī* who responds in legal terms to the public's concerns. Although it is not an exchange between those of equal social status, the process of seeking a fatwa is nonetheless a dialogical activity stemming from the concerns of the Muslim public; thus, this process is spawned by factors in the social environment. We will see later how this peculiar character of *iftāʾ* (the process of issuing fatwas) is embedded in the discursive sources of Islam that encouraged its dialogical form.

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QUESTIONS REGARDING THE AUTHENTICITY OF EARLY ISLAMIC LEGAL MATERIAL

Before outlining the topics addressed in this inquiry, I would like to say a few words about the historical materials used in the first two chapters. Modern Western historical scholarship has problematized many of the historical reports and doubted the authenticity of discourses that were ascribed to authors in the first two hundred years of Islam, claiming that such reports are not authentic reflections of the actual events that took place or that the provenance of these discourses is questionable. This assertion poses a problem for anyone who seeks to make historical claims about the early period of Islam. On the other hand, more recent voices in Western historical criticism have come to question the categorical nature of this assertion that has dominated Western circles of scholarship for much of the twentieth century.

For instance, the work of the German *ḥadīth* critic Harald Motzki titled *The Origins of Islamic Jurisprudence*[2] is an extensive study on certain sections of the *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī (d. 211 AH), a collection containing opinions about Islamic religious practice from religious figures in the first two centuries of Islam. After analyzing the opinions (fatwas) of religious figures dating from the late first and the early second century of Islam, Motzki argues persuasively that the reported legal opinions found in this work can be safely dated to that period.

Much of the suspicion in Western scholarship about these reports and discourses stems from their preservation in later recorded narrative sources and the lack of documentary (read material) evidence, indicating the authenticity of these reports and discourses. Yet, as some historians assert, information about early Islamic history was recorded in later narrative sources because of the awareness that the materiality of the documents would not be preserved.[3] Lena Salaymeh asserts that "sources that were not written contemporaneously with historical events are not fundamentally ahistorical for several reasons:

1. Contemporaneous sources are not inherently more reliable than later sources;
2. Not all written sources should be categorized as 'later' because the narratives transcribed in them were initially composed orally

[2] See also Motzki's more recent co-authored work *Analysing Muslim Traditions: Studies in Legal, Exegetical and Maghāzī Ḥadīth*, 3, where he critiques some of Schacht's assertions about the inauthenticity of early Islamic traditions.

[3] See Salaymeh (2016, 25), where she attributes this assertion to Chase Robinson.

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and transmitted contemporaneously as part of both a narrative-historical and a living legal tradition;

3. Later written sources are based on both oral sources and contemporaneous written texts that are no longer extant … [that is] contemporaneous written sources that did not survive may be embedded within later written texts;[4]
4. Most of what we know about certain periods of the past come through non-contemporaneous sources, if these are rejected then it becomes impossible to write a history about these periods."[5]

These new developments in Western historical criticism and the critiques of its methodological limitations create room for researchers to make claims about the early Islamic period with some confidence. Yet whether one believes that the historical reports about early Islam, which are used in the initial part of this study, are authentic or not does not take away from what this study seeks to accomplish. What matters most for this investigation is that those who constructed the Islamic legal tradition believed that such reports were accurate and consciously appealed to these representations when forming this tradition. With this in mind, the debate within Western historical scholarship about the historicity of early Islam will not be of concern to this investigation, as my main concern is the construction of a legal tradition regardless of whether the historical information used in that construction was authentic, from the Western point of view, or not.

OUTLINE AND DESCRIPTION OF THE CHAPTERS

Following these preliminary remarks on the historical authenticity of the subject of this investigation, I may now restate the tenor of this study followed by a synopsis of its chapters. *Fatwa and the Making and Remaking of Islamic Law* consists of six chapters and a conclusion. The organization of the chapters is chronological, starting with the early period of Islam moving all the way to the post-colonial Muslim world. Although the work does not focus on any particular period, person, or place throughout, I weave the narrative around the legal practice of *iftā'*, whose product is the fatwa – a practice from which Islamic legal norms, methodologies, and institutions emerged. By tracing the path of fatwas in the successive phases of the history of Islamic law, I keep the longue durée of the narrative tightly focused, all the while underlining the range

[4] See also Motzki who similarly argues this point in *The Origins of Islamic Jurisprudence*.
[5] Salaymeh, 32.

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of discourses, events, institutions, persons, and places that fashioned the enterprise of Islamic law.

Chapter 1 ("Fatwa in the Prophetic and Post-Prophetic Period") deals with the discursive origins of the fatwa by examining the fatwas during the period of prophecy. My argument here is that *iftāʾ*, the fatwa production process, is fundamentally a dialogical activity that has its discursive roots in the dialogical manner by which both the Quran and the Prophet engaged early Muslim adherents. I then look at some of the fatwas in the post-prophetic period where the early Muslim community faced new sociopolitical challenges and how Muslims resorted to the activity of *iftāʾ* as a socio-legal mechanism for resolving their problems. I show that in their resolutions to these problems, early Muslims employed various approaches of scriptural hermeneutics and legal reasoning that would later become standardized legal precepts in Islamic legal methodology and theory.

Chapter 2 ("Fatwa in the Classical Age") analyzes fatwas from the late first century to the third century of Islam for the sake of discovering the defining features of the fatwa tradition. Here, I show how fatwas became the vehicle actualizing the Quranic ethico-legal norms in the sociohistorical context of Islam. I show how the Islamic legal norms and injunctions that were promulgated by the Quranic discourse and prophetic practice became interpreted, applied, and reinterpreted in various historical and cultural contexts through the process of *iftāʾ*. The forms of legal reasoning and the interpretive devices employed in these fatwas became the basis of an Islamic legal discourse.

Chapter 3 (Fatwa and the Formation of Islamic Legal Discourses, Institutions, and Society) discusses the emergence of distinct Islamic principles and practices in the third/ninth through the fifth/eleventh centuries. I do this by charting the formation of Islamic legal theory and Islamic legal doctrines/schools and show how the substantive and formal roots of these disciplines and institutions partially emerged from the fatwas of previous generations of Muslim jurists. Moreover, I spell out the dialectical relationship that developed between the activity of *iftāʾ* and these new legal formations.

Chapter 4 ("The Formation of the Islamic Legal Tradition and the Formalization of *Iftāʾ* within the Legal Schools") shows how past legal practices played a determinative role in the formation of the Islamic legal tradition. I describe the nature of the relationship of the past to the Islamic legal tradition by looking at the ideas and institutions that came to embody that tradition and how these ideas and practices were shaped

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by the fatwas of past jurists whose legal pronouncements informed the content of Islamic legal doctrines developed in subsequent centuries. Once this foundation is laid, the remainder of the chapter shows how the establishment and maturation after the fifth/eleventh century of Islamic legal schools, or *madhhab*s, and the legal doctrines that define them led to a structuring of the process of *iftā'* where this activity became governed by a set of discursive rules and procedures that contributed to the greater formalization of this legal practice. Muslim jurists within each school now began to lay down rules on how fatwas were to be issued within the confines of the legal doctrines of those schools. In order to understand the form that fatwas take in the post-classical period of Islam, I delineate those discursive rules for fatwa production as found in what is known as *adab al-fatwā* (the protocols of fatwa) literature.

Chapter 5 ("Fatwa in the Age of the Preponderance of the Legal Schools") illustrates more concretely how the discursive rules of fatwa, defined in the previous chapter, were applied in actual fatwas of the period between 1100 and 1850 CE. This was the period when legal schools/doctrines (*madhhab*s) and legal theory (*uṣūl al-fiqh*) were fully established and firmly rooted in Islamic legal practice in ways that they exerted the most influence on the subsequent production of Islamic legal rulings. I accomplished this task by sampling and analyzing fatwas from the period in question. In my selection of fatwas, I choose representative samples of major fatwas in order to show the nature of the activity of *iftā'* during this era and how this activity had been transformed since the classical age of fatwa. Moreover, this chapter demonstrates how fatwas helped Muslim society keep pace with social change by modifying the legal corpus that governed it.

Chapter 6 ("Colonialism, Islamic Law, and the Post-Colonial Fatwa") outlines the historical effects that European colonialism had on Muslim society and law in the nineteenth and twentieth centuries. The intellectual challenge posed by Western "modernity" to established Muslim ideas and institutions had a seriously destabilizing outcome. I document the impact of this "modernity" on Muslim thought and society, focusing on the challenges it presented to Islamic legal institutions and how these challenges affected Islamic legal discourse in the colonial period. Building on this historical foundation, I then gauge the impact of modernity on colonial and post-colonial Islamic legal discourse by analyzing fatwas from this period. The purpose of this analysis is to assess how Islamic law and legal institutions have negotiated the challenges of the colonial and post-colonial predicament through the use of traditional legal practices

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such as fatwa. In addition, the analysis will gauge the extent to which new approaches to legal reasoning represent a substantive transformation in Islamic legal discourse and practice.

Ultimately, the primary question this book seeks to address is how the legal practice of issuing fatwas (*iftāʾ*) played an influential role in the evolution of a distinct legal tradition. Moreover, my investigation sheds light on how this practice was a social instrument that facilitated the formation of an Islamic society that was centered on legal norms and how this practice allowed those legal norms to adapt to sociohistorical changes over time. Thus, fatwas are, in a way, a discursive barometer for measuring change and continuity in Islamic civilization.

Yet beyond discussing the formalities of law, what this work ultimately demonstrates is how a civilization faced with the challenges of history devised its distinctive strategies to cope with those problems. The book shows how Muslims in each historical period asked a different set of questions about the world in which they lived and the kinds of resolutions that they reached. Their queries reflected their concerns of how to live a rational, ethical, and spiritual life in light of the distinctive forms of rationality and values that they espoused, as well as how to regenerate those values despite the vicissitudes of every age.

QUESTIONS ON METHOD AND APPROACH IN THIS STUDY

Before beginning this investigation, I wish to make several clarifications about my approach and theoretical framework. First, I define a fatwa as any statement, oral or written, that establishes the legitimacy or lack thereof of an action, position, or practice and is pronounced by someone who is vested with legal authority, whether the origins of that authority lie in political institutions or simply the religious and social sphere. In defining fatwas in this way, I exclude most juridical decisions (*qaḍāʾ*) from being fatwas because these verdicts did not necessarily establish the legitimacy of human practice, at least in the case of Islamic law. In most cases, juridical decisions merely adjudicated whether those actions were within the bounds of the already established Islamic norms. At the same time, fatwas are different from court decisions because they are not inherently political acts, as they were not always backed by state sanction as in the case of juridical verdicts; hence, they are non-binding by nature.

Moreover, given this definition of a fatwa, I take the statements of early Muslim jurists as fatwas even when we do not always know the

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social circumstances that brought about their pronouncements. This is because their statements that carried legal implications were not binding during their lifetime in the same way they came to be religiously binding when later generations of legal specialists selected some of those opinions to be especially authoritative and from them formulated legal doctrine (*fiqh*). Even when some of the pronouncements of early jurists made their way into the body of Islamic jurisprudence that came to be known as *fiqh*, at the time that these legal statements were made, they functioned like fatwas in the sense that they were legal responses to religious issues that were of concern to Muslim society and were at the time non-binding. Hence, I use such statements in my work as fatwas. Furthermore, this definition of a fatwa includes short treatises that were written by later legal authorities, treaties that respond to new issues that arose in Muslim society even though we do not have the specific questions that were posed to them that generated their response.

Second, the idea of charting the history of Islamic law though one of its central practices is analogous to creating a discursive map of the enterprise. Mapping generates a portrayal of a subject that focuses on one of its dimensions to the exclusion of all other aspects of its reality. As this is my adopted approach to the study of Islamic law, my attention is not so much focused on the persons, periods, and places that have been integral to the development of the law – and that form the themes of most other studies of Islamic law. Instead, I have chosen to highlight the role of one of its most distinct practices (fatwa-making) that has shaped its trajectory. The benefit of such an analysis is that it allows for the weaving together of diverse persons, periods, places, and principles by considering the common thread of their shared legal practice. This allows us to tie together those seemingly disparate themes and approaches to looking at the law and thus to generate a cohesive picture of our subject.

Third, I utilize Talal Asad's theoretical insight of "discursive tradition"[6] as the overarching framework for understanding the character of the practice of fatwa-making in Islamic history and the enterprise of Islamic law in general. I say that this notion is both a guiding insight and a point for corroboration since Asad's initial proposal and definition of this seminal idea as a way to approach the study of Islam do not give an actual demonstration of how this concept can be applied to real social or historical events. This study demonstrates how Asad's theoretical insight can be applied to the history of Islamic law so that the reader

[6] Asad, 1986, 14.

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can appreciate the distinctiveness of this religious enterprise. At the same time, it provides a historical demonstration of one of the ways in which this concept of "discursive tradition" can be more fully articulated to give profound expression to sociohistorical processes.

Beginning with Asad's definition of a discursive tradition as consisting of "discourses that seek to instruct practitioners regarding the correct form and purpose of a given practice that, precisely because it is established, it has a history,"[7] I provide a historical outline, in the first three chapters, of those discourses and evolving discursive practices that come to comprise the Islamic legal tradition. In doing so, I show that this tradition embodies a distinctive modality of how to interact with those fundamental discourses so as to construct a set of legitimate religious practices. I then provide an argument in Chapter 4 as to why the Islamic legal tradition is an exemplary historical illustration of what Asad calls a discursive tradition and how it is distinguished from other discursive traditions.

Fourth, as much as discourses play a fundamental role in defining discursive traditions, they are also shaped by their distinct discursive practices. I alluded to the dialogical character of fatwas as discursive statements that are generated by a dialogical interaction between religious specialists and non-specialists. But such dialogically produced statements also became the medium of legal conversation by which these specialists negotiated their differing legal opinions. From such dialogical engagements that represented a distinct form of discursive practice, foundational discourses were formed and a legal tradition emerged. Thus, the Islamic legal enterprise is not merely a discursive tradition; it must also be understood fundamentally as a dialogically negotiated discursive tradition that arose from this social transactional approach to the law.

Fifth, another aspect of fatwas that is linked to the social processes that inform this dialogically negotiated discursive tradition is their phronetic character. *Phronesis* is an Aristotelian conception denoting a kind of practical reason. As one author describes it: "*phronesis* designates a form of historically informed, prudential judgment which seeks to determine not what is eternally true or valid, but … 'what is feasible, what is possible, what is correct here and now'."[8] Fatwas reflect this skill by situating universal ethical ideals in a discreet historical moment.[9] So these

[7] Asad, 1986, 14.
[8] Madison, 319.
[9] See Omer Awass' article "Fatwa and the Art of Ethical Embedding" in *Journal of American Academy of Religion (JAAR)* September 2019, vol. 87, no. 3, pp. 765–790.

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statements, theoretically speaking, are historically informed discourses and not merely normatively determined judgments. They change as they traverse different times and places. Having this character of historical contingency, they continually reshape the discourses that define this dialogically negotiated discursive legal tradition, thereby maintaining the dynamism of this tradition in various periods and places.

SITUATING THIS WORK WITHIN THE LITERATURE ON FATWA AND ISLAMIC LAW

One thing that stands out when situating this work with existing literature on fatwa and Islamic law is that this is the only book-length treatment in English that charts the history of fatwas from their beginning until today and links that history to the development of the Islamic legal tradition. Although there have been many works on Islamic law, there is a dearth of literature in English on fatwas. What does exist on the topic, for example, are edited volumes that introduce the reader to the genera of the fatwa. But the disparate character of the contributions within such volumes makes it difficult for such works to contain an overarching theme that unifies the various approaches to the study of fatwas.

Other works on fatwas focus on a particular period and/or place and look at how fatwas have been instrumental in the formation of political or social institutions and projects or how fatwas have assisted Muslim societies in responding to contemporary challenges. My work addresses those very same themes but does so over a longer duration and a greater spatial span, showing that those historical processes that are attributed to fatwas, and their corollary practices and institutions, were not merely the result of the contingencies of a particular period or place, but a part of the function of fatwas throughout history. More importantly, considering the long durée also shows us how the practice of fatwas has transformed over time because of the historical changes.

Yet this work is to be situated not only with other works on the fatwa, but because of its broad historical and thematic scope, it also is to be placed in conversation with other general works on Islamic law that are trying to break the existing stereotypes about the misplaced origins and alleged stagnation of Islamic law. This book makes a solid argument for the organic unfolding of Islamic law from the internal discursive and historical dynamics of Muslim civilization itself without denying the influence of other legal heritages on the development of Islamic law. At the same time, it shows how fatwas allowed for the adaptation of the

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law to changing social and political circumstances. This work never loses sight of this overarching theme even as it delves into the minutia of legal rulings, methods, and practices.

By presenting a logical and historically plausible narrative about the origins and development of Islamic law, it loosens the hold that past academic theories have had on this subject for decades. These theories have rendered that early history as either being shrouded in mystery or a result of some civilizational-wide orchestrated effort to invent an origins story for Islamic law that could legitimate various political and religious agendas. In my estimation, the purveyors of the latter theory have never been able to creditably point to any specific individuals or groups acting in coordination with one another that could plausibly account for this presumption of massive fraud. What such parties may have more convincingly shown is how particular pieces of historical evidence problematize the classical Muslim explanation of the beginning of Islamic law. However, it is beyond the scope of this book to deal with all the claims of these hypercritical historians aside from the arguments I forwarded earlier in this introduction that point to their limitations.[10] Rather what this work merely seeks to achieve in entering that debate, albeit indirectly, is to present a coherent alternative explanation that could render early Islamic law intelligible.

Yet this work also speaks to the Islamic law stagnation debate in Western scholarship, which is said to have taken place in the latter half of the post-classical period (c. 1300) when the formation of Islamic legal schools and legal doctrines had supposedly reached their zenith. I do this by demonstrating how fatwas during this period kept Islamic law current with social changes. What my presentation will show is that Islamic legal institutions were more dynamic than originally perceived even though the pace of civilizational change was more conservative than it was in the formative period since these institutions had reached their developmental maturity. Thus, it adds arguments and evidence to the growing literature in the field that challenges the stagnation thesis of Islamic law.

Yet this work makes important interventions in the study of modern Islamic law. Most works discuss the challenges faced by Islamic law in our times and how colonialism and the post-colonial realities have disrupted the operations of this law within Muslim societies. My work not only furthers this debate but also shows the strategies by which modern

[10] See the section titled "Questions Regarding the Authenticity of Early Islamic Legal Material."

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Muslim actors and institutions have been negotiating those challenges to maintain the law's dynamism and relevance in the contemporary period. Some of the unique conclusions reached by this analysis are that despite the continued usage of traditional legal practices like the fatwa in the current situations, what has changed is the strategies of how such practices are employed. The recent production of fatwas is marked by increasing hybridity between modern methods and historical approaches to the law. In making this identification, this work foreshadows the directions that the law will develop in the future.

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